No. 1244

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

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A. T. GORDON, ET AL.,
*Petitioners and*
*Intervening Defendants Below,*

VS.

GRANVILLE H. LANCE, ET AL.,
*Respondents and*
*Plaintiffs Below,*

AND

THE BOARD OF EDUCATION OF THE COUNTY OF ROANE, *a corporation,* ET AL.,
*Respondents and*
*Defendants Below.*

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**BRIEF OF RESPONDENTS, GRANVILLE H. LANCE, ET AL., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA**

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## REASONS FOR DENYING PETITION

## ARGUMENT

The West Virginia Supreme Court of Appeals correctly applied to this voting case the Equal Protection Clause and the principles established thereunder by this Court and held that the votes of the respondents herein had been unconstitutionally debased or diluted.

Shorn of rhetoric, the issue presented below and here is whether the West Virginia requirement that at least 60% of the voters must cast their ballots in favor of bonds and tax levies for school improvement is contrary to the equal protection guaranteed voters by the Fourteenth Amendment. The conclusion of the Court below was that the state grant of 50% greater voting effectiveness to every person voting in the negative in such election constituted an impermissible dilution or debasement of the vote of each person voting in the affirmative.

The Board of Education of the County of Roane, a respondent herein and defendant below, properly submitted to the voters of that County (1) the question of authorizing excess tax levies for a period of five years, a part of which additional revenue was to be used for current expenses and the remainder for capital improvements clearly needed because of marked school deficiencies, and (2) the question of incurring debt and issuing bonds in the amount of $1,830,000, the proceeds to be used for capital improvements to replace condemned structures. Of the voters participating in the election, 51.51% voted in favor of the excess tax levy and 51.55% voted in favor of the issuance of bonds. The Board of Education thereafter refused to increase the tax levy or issue bonds on the grounds that the Constitution and statutes of West Virginia required a 60% affirmative vote before the tax levy could be increased above the fixed standard and a three-fifths affirmative vote before bonded indebtedness could be incurred.[1]

The refusal of the Board of Education was upheld in the Circuit Court of Roane County but on appeal, the

[1] W. Va. Const. art. X, §§ 1, 8; W. Va. Code ch. 13, art. 1 §§ 4, 14 (Michie 1966); W. Va. Code ch. 11, art. 8 § 16 (Michie 1966).

West Virginia Supreme Court of Appeals, relying upon *Gray* v. *Sanders*, 372 U.S. 268 (1963) and its offspring, held that the 60% requirements were impermissible under the Federal Constitution.

The concept of equal protection has traditionally required uniform treatment of persons standing in the same relation to governmental action. In voting cases this concept has meant that once an electorate or constituency is properly defined, there can be no denial, debasement or dilution of votes cast from within that electorate. *Reynolds* v. *Sims*, 377 U.S. 533 (1964). The touchstone of vote debasement or dilution has been termed "one person, one vote" and is whether each person's vote is permitted to count as much, insofar as it is practicable, as any other person's vote. *Hadley* v. *Junior College District*, 38 LW 4161 (Feb. 25, 1970); *Avery* v. *Midland County*, 390 U.S. 494 (1968); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964).

Under the West Virginia constitutional and statutory provisions, one person's vote does not count as much as every other person's vote. The requirement of a 60% affirmative vote means that every person's vote "against" counts 150% more than any vote "for". In practical terms this means that it requires three affirmative votes to count as much as only two negative votes; thus, one out of every three voters favoring the issuance of bonds or increased tax levy is effectively disenfranchised by the West Virginia scheme of weighting the votes. Respondents believe that the West Virginia Court properly concluded from the principle of "one person, one vote" that the 60% requirement unconstitutionally diluted or debased the votes of respondents and others of the electorate who voted in the affirmative.

It should be noted that the Supreme Court of New Mexico in *State ex rel. Witt* v. *State Canvassing Board*, 437 P. 2d 143 (N.M. 1968), reached essentially the same conclusion as the West Virginia Court from the principles contained in this Court's "one person, one vote" decisions in holding that New Mexico's constitutional requirement that constitutional amendments be ratified by two-thirds affirmative vote in each county violated the precepts of the Fourteenth Amendment.

It matters not that this election was a local, special-purpose election or that it involved issues of policy—not candidates. This Court applied the Equal Protection Clause to a local election in *Avery*, and to local, special-purpose elections in *Hadley; Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); and in *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969). The election involved in *Cipriano* was not between candidates, but had been called for the electorate's approval or disapproval of the issuance of revenue bonds by a municipal utility and this Court did not find that this fact would preclude constitutional protection. In *Hadley* this Court stated, ". . . there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election."

The requirement of 60% affirmative votes in an election is, in effect, but a more sophisticated and subtle approach than the crude "fencing out" of an otherwise qualified segment of the electorate in an attempt to provide another segment with special protection. The latter approach has been specifically proscribed by this Court in *Cipriano, Kramer*, and *Carrington* v. *Rash*, 380 U.S. 89 (1965).

Petitioners try to torture this case into grotesque exception to the holdings of *Gray* and its progeny, but it is inescapable that these were all voting cases and central to each was the issue of whether there had been a constitutionally forbidden debasement or dilution of votes. The instant case raises the very same issue—did the state debase or dilute the votes of those who voted in the affirmative by giving substantially less weight to them than to negative votes. It appears to respondents that the petitioners suffer from tunnel vision in narrowly viewing the "one person, one vote" holdings as requiring no more than equal access to the polls. (Petition at 10, 11). They do not see the equally important mandate that all votes cast must be counted and each person's ballot shall constitute one whole vote.

In their assumed concern for bond counsel's peace of mind, the petitioners have injected an extraneous, unsupported note into this case. If there is currently any instability in the market for West Virginia school bonds, respondents respectfully submit that the uncertainty is caused by the pendency of this petition. The law governing this issue has been clearly spelled out by this Court and accurately applied to the facts of this case by the West Virginia Court. The issue is reliably settled unless the writ sought herein is granted.

The assertion of petitioners that the decision of the Court below begs the question by assuming the validity of the majoritarian principle is a manifest confusion of the result with the pivotal issue of whether votes are debased and diluted by the 60% requirement. When any Court addresses itself to the question of unconstitutional vote debasement, the test to be applied is the Fourteenth Amendment. The Fourteenth Amendment neither com-

nciple but it does com-
pels nor forbids a majoritarian pri its electorate and to
pel a state reasonably to define orate equal treatment
accord the voters within the elect same as every other
by counting each person's vote th otection reaches the
person's. The aegis of equal p quantity. This Court,
quality of the vote as well as the d the West Virginia
we think, has clearly spoken an sponded with careful
Supreme Court of Appeals has r
discernment.

## CONCLUSIO

ri to review the deci-

The petition for writ of certior eals of West Virginia
sion of the Supreme Court of App rt correctly ascertain-
should be denied because that Co equal protection con-
ed and applied the principles of nt in order to prevent
tained in the Fourteenth Amendm
debasement of respondents' votes

day of March 1970,

Respectfully submitted this 23rc

RANCIS, JR.

J. HENRY

WISE, JR.

CHARLES C.

*for Respondents*
*Attorneys tiffs Below*
*and Plai*